Platinum Nanochem Sdn Bhd v Mecpro Heavy Engineering Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-466–10 OF 2014
YEOH WEE SIAM J
15 FEBRUARY 2016

Contract — Breach — Termination — Whether plaintiff's termination of contract wrongful — Whether plaintiff actual contract-breaker — Whether plaintiff's claims against defendant for breach unsustainable because defendant's failure to complete contract in time caused by plaintiff's non-fulfillment of obligations — Whether contractual deadline for completion became open-ended when plaintiff allowed defendant to carry on working after stipulated completion date passed — Whether defendant treated contract as subsisting up until time it filed counterclaim to plaintiff's suit for alleged breach

The plaintiff engaged the defendant to carry out modification works to a biodiesel production plant ('the plant') it owned and operated. The contract provided that if the defendant could not complete the works by a final completion date or an extended completion date, it had to absolutely do so by a delay default date ('DDD') on 30 April 2014. In the instant suit, the plaintiff contended that the defendant's failure to complete on or before the DDD was a fundamental breach entitling it to terminate the contract. Although the DDD came and passed, the plaintiff allowed the defendant to continue working until it was told to leave the plant site in early June 2014. The plaintiff gave the defendant formal notice of termination of the contract only on 9 October 2014 and sued for recovery of various damages, loss and costs. In its defence and counterclaim for payment of what was due to it under the contract, the defendant denied breaching the contract and alleged that it was the plaintiff's failure to comply with its contractual obligations that prevented the defendant from completing the works by the DDD. Accordingly, the defendant contended, the plaintiff's termination of the contract was wrongful.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim in part:

(1) The plaintiff failed to prove its claim on balance of probabilities. The court found the plaintiff was the contract-breaker and had wrongfully terminated the contract. The court agreed with the defendant that in view of Schedule II in the contract, there was an express and/or implied term that the defendant's obligation to complete acceptance testing was subject to the plaintiff fulfilling its obligations first. From the evidence, it

was clear the plaintiff did not fulfill its obligations as it did not provide the thermal boiler that could provide the required heat energy and temperature to enable the defendant to complete the acceptance testing for the modified plant to operate at full capacity. This delay went on until the DDD on 30 April 2014 (see paras 38, 47, 92(a) & 93).

(2) Although the plaintiff took the position that if the contract was not performed by 30 April 2014, it was entitled to terminate the contract, the plaintiff did not do so on that date. Between 30 April 2014–2 June 2014, the plaintiff allowed the defendant to continue with the acceptance testing and doing rectification work. The plaintiff told the defendant to vacate the plant site by 7 June 2014 and only formally gave the letter of termination to the defendant on 9 October 2014. It could safely be concluded that the plaintiff, by its conduct, had affirmed the contract from 30 April 2014–6 June 2014 (ie the day prior to the date the defendant was required to vacate the site). When the deadline of 30 April 2014 was no longer applicable, there was no new timeline or deadline that was agreed to by both parties, thus leaving the contract with an open-ended completion date (see paras 78–80).

(3) When the acceptance testing was not completed by 30 April 2014, the innocent party had the right to decide whether to go on with the contract or otherwise. In this case, the plaintiff having breached the contract by not providing the defendant with the required heat and temperature from the thermal boiler for the thermic fluid was not the innocent party and therefore had no right to terminate the contract. At all times, the defendant wanted to continue with the contract but was asked by the plaintiff to vacate the plant site by 7 June 2014. The defendant, being the innocent party, did not treat the contract as at an end. When the plaintiff filed this writ action, the defendant decided to file its counterclaim. The counterclaim could be treated by this court as sufficient evidence of the defendant's intention to treat the contract as at an end and a sufficient communication of that intention to the plaintiff. The defendant was entitled to avail itself of the remedies provided to it under the contract in the event of the plaintiff's default (see paras 85, 87 & 89).

(4) The defendant was entitled to refund of the performance bank guarantee of USD140,000 which the plaintiff had wrongly encashed. However, based on the terms of the contract, the defendant was not entitled, inter alia, to be paid the contractor's bonus of USD500,000 or for damages for loss of reputation or for breach of confidentiality and/or breach of confidence and/or infringement of intellectual property (see paras 95–100 & 106–109).

[Bahasa Malaysia summary

Plaintif menggajikan defendan untuk menjalankan kerja-kerja pengubahsuaian kepada loji pengeluaran biodiesel ('loji') yang dimiliki dan dikendalikannya. Kontrak memperuntukkan bahawa sekiranya defendan tidak dapat menyiapkan kerja-kerja pada tarikh penyiapan terakhir atau tarikh penamatan lanjutan, defendan harus bersungguh-sungguh berbuat demikian pada tarikh kelewatan ingkar ('TKI') pada 30 April 2014. Dalam guaman ini, plaintif berhujah bahawa kegagalan defendan untuk menyiapkan pada atau sebelum TKI adalah pelanggaran asas yang melayakkannya untuk menamatkan kontrak. Walaupun TKI datang dan berlalu, plaintif membenarkan defendan untuk terus bekerja sehingga ia diberitahu untuk meninggalkan tapak loji pada awal Jun 2014. Plaintif memberi notis rasmi defendan penamatan kontrak hanya pada 9 Oktober 2014 dan mendakwa untuk pemulihan pelbagai kerosakan, kerugian dan kos. Dalam pembelaan dan tuntutan balas untuk pembayaran apa yang terhutang kepadanya di bawah kontrak, defendan menafikan melanggar kontrak dan mendakwa bahawa kegagalan plaintif untuk mematuhi kewajipan kontrak yang menghalang defendan daripada menyiapkan kerja-kerja pada TKI. Oleh itu, defendan berhujah penamatan kontrak plaintif adalah salah.

Diputuskan, menolak tuntutan plaintif dan membenarkan sebahagian tuntutan balas defendan:

(1) Plaintif gagal untuk membuktikan tuntutan atas imbangan kebarangkalian. Mahkamah mendapati plaintif adalah pelanggar kontrak dan telah secara salah menamatkan kontrak. Mahkamah bersetuju dengan defendan bahawa menurut Jadual II dalam kontrak, terdapat terma nyata dan/atau tersirat bahawa kewajipan defendan untuk melengkapkan ujian penerimaan adalah tertakluk kepada plaintif memenuhi kewajipannya terlebih dahulu. Daripada keterangan, adalah jelas plaintif tidak memenuhi kewajipannya kerana ia tidak menyediakan dandang haba yang boleh menyediakan tenaga haba dan suhu yang diperlukan untuk membolehkan defendan untuk melengkapkan Ujian Penerimaan untuk loji yang diubah suai supaya boleh beroperasi pada kapasiti penuh. Kelewatan ini berlanjutan sehingga TKI pada 30 April 2014 (lihat perenggan 38, 47, 92(a) & 93).

(2) Walaupun plaintif mengambil kedudukan bahawa sekiranya kontrak tersebut tidak dilaksanakan pada 30 April 2014, ia berhak untuk menamatkan kontrak, plaintif tidak berbuat demikian pada tarikh tersebut. Antara 30 April 2014–2 Jun 2014, plaintif membenarkan defendan untuk meneruskan dengan ujian penerimaan dan melakukan kerja-kerja pembaikian. Plaintif memberitahu defendan untuk mengosongkan tapak loji pada 7 Jun 2014 dan hanya secara rasmi memberikan surat penamatan kepada defendan pada 9 Oktober 2014.

Adalah selamat untuk disimpulkan bahawa plaintif, melalui perbuatannya, telah mengesahkan kontrak dari 30 April 2014–6 Jun 2014 (iaitu hari sebelum tarikh defendan dikehendaki mengosongkan tapak). Apabila tarikh akhir 30 April 2014 tidak lagi terpakai, tiada had masa atau tarikh akhir baru yang dipersetujui oleh kedua-dua pihak, sekaligus meninggalkan kontrak dengan tarikh siap terbuka (lihat perenggan 78–80).

(3) Apabila ujian penerimaan tidak disiapkan pada 30 April 2014, pihak yang tidak bersalah mempunyai hak untuk membuat keputusan sama ada untuk meneruskan kontrak atau sebaliknya. Dalam kes ini, plaintif telah melanggar kontrak dengan tidak menyediakan defendan dengan haba dan suhu yang diperlukan dari dandang haba untuk cecair thermic bukanlah pihak yang tidak bersalah dan oleh itu tidak mempunyai hak untuk menamatkan kontrak. Pada setiap masa, defendan mahu meneruskan dengan kontrak tetapi telah diminta oleh plaintif untuk mengosongkan tapak loji pada 7 Jun 2014. Defendan, sebagai pihak yang tidak bersalah, tidak menganggap kontrak sebagai berakhir. Apabila plaintif memfailkan tindakan writ ini, defendan mengambil keputusan untuk memfailkan tuntutan balasnya. Tuntutan balas boleh dianggap oleh mahkamah sebagai keterangan mencukupi mengenai niat defendan untuk menganggap kontrak tersebut sebagai sudah berakhir dan komunikasi yang mencukupi tentang niat tersebut kepada plaintif. Defendan berhak untuk menggunakan sendiri remedi-remedi yang diperuntukkan kepadanya di bawah kontrak sekiranya plaintif ingkar (lihat perenggan 85, 87 & 89).

(4) Defendan berhak untuk membayar balik jaminan prestasi bank sebanyak USD140,000 di mana plaintif telah tersalah tunaikan. Walau bagaimanapun, berdasarkan syarat-syarat kontrak, defendan tidak berhak, antara lain, untuk dibayar bonus kontraktor sebanyak USD500,000 atau ganti rugi bagi kehilangan reputasi atau untuk pecah kerahsiaan dan/atau pecah kepercayaan dan/atau pelanggaran harta intelek (lihat perenggan 95–100 & 106–109).]

Notes

For cases on termination, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3804–3826.

Cases referred to

Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420, CA (folld)

Legislation referred to

Stamp Act 1949 s 52

Ramesh NP Chandran (Sazarina Said with him) (Ramesh Yum & Co) for the plaintiff.

Harikannan Ragavan (Wong Weng Foong with him) (Jayadeep Hari & Jamil) for the defendant.

Yeoh Wee Siam J:

BACKGROUND FACTS

[1] The plaintiff is a company having its place of business in Damansara Heights, Kuala Lumpur.

[2] The plaintiff owns and operates an existing pre-treatment refinery/plant which produced feedstock (or raw material) to produce biodiesel ('plant') at Senawang Industrial estate, 70450 Negeri Sembilan ('plant site').

[3] The defendant is a company incorporated in India and has a business address in New Delhi, India and/or in Punjab, India.

[4] On 20 June 2013, the plaintiff and defendant entered into an engineering procurement construction and commissioning agreement, supplemented by addendum No 1 dated 31 December 2013 (collectively referred to as 'EPCC contract' or 'contract') (CBOD Pt A pp 9–113).

[5] Pursuant to the contract, the defendant, as the turnkey general contractor, was appointed to:

(a) retrofit or modify the plaintiff's existing plant to a new plant with the defendant's layer esterification facility ('LEF'); and

(b) deliver a fully operational 300 MTPD plant ('plant capacity') of 90% free fatty acid ('FFA') feedstock to a quality of refined bleached deodorised palm oil with a FFA content of not exceeding 0.25%, and performing at not less than 90% of the installed capacity of the LEF.

[6] Basically, the defendant's obligation under the contract is to modify the plaintiff's existing plant to enable the modified plant to use lower quality raw material (ie higher FFA) and produce a better quality feedstock (ie much lower FFA) at Stage 1. The better quality feedstock will then be used by the plaintiff at Stage 2 to produce biodiesel.

[7] The contract price is RM9,159,150 (USD2,818,200). The payment milestone schedule is in Schedule III of the contract.

[8] In accordance with the agreed payment milestone schedule, the plaintiff made a total payment of RM5,596,500 (USD1,722,000) to the defendant. The final milestone payment of RM3,562,650 (USD1,096,200) has not been paid by the plaintiff to the defendant yet.

[9] The payment milestone schedule stipulates that the final milestone payment is subject to and due only upon final completion being achieved and the certificate of completion has been signed off by the plaintiff and the defendant.

[10] It is undisputed that both parties have agreed on the following timelines for the performance of the contract:

(a) guaranteed final completion date of the LEF is on/before 31 December 2013 (Schedule I, CBOD Pt A p 47);

(b) since final completion of the LEF was not achieved on 31 December 2013, the extended completion date is 15 January 2014 (addendum No 1, CBOD Pt A p 111); and

(c) since the LEF was not completed by the extended completion date, the defendant was required to achieve final completion of the LEF on/before the delay default date ('DDD') of 31 April 2014 (Schedule I, CBOD Pt A p 46) (note: there are only 30 days in April 2014, but the plaintiff has averred that the DDD was on 31 April 2014. For the purposes of this judgment, I shall refer to the DDD as being on 30 April 2014).

[11] In accordance with article 14 of the contract, the defendant provided the plaintiff with a performance bank guarantee of USD140,000 for the due performance of the defendant's obligations under the contract, which the plaintiff is entitled to encash in the event of breach or default by the defendant of the contract.

[12] The plaintiff contends that the defendant's failure to achieve the final completion of the LEF on/before the delay default date of 30 April 2014 constitutes a fundamental breach of the terms of the contract which resulted in the total failure of consideration of the contract giving rise to the defendant's event of default under section 13.1.5 of the contract.

[13] On this basis of termination, the plaintiff notified the defendant to vacate the plant site before 7 June 2014, which the defendant complied with on

3 June 2014. The plaintiff gave written confirmation of the termination of the defendant's services on 9 October 2014.

THE PLAINTIFF'S CLAIM

[14] The plaintiff claim is that the defendant had failed to complete the works by 30 April 2014 ('the DDD'), thereby entitling the plaintiff to terminate the contract on or about 3 June 2014. Due to the defendant's delay and failure in completing the project, the plaintiff suffered losses.

[15] The plaintiff is now seeking to recover a refund to the consequential loss under section 13.2.4 of the contract which includes the following:

(a) full recovery of the contract price paid to the defendant including the non-obligation to pay the final payment milestone since the condition for payment has not been met;

(b) the recovery of all cost and expenses incurred to support ongoing activities of the defendant to achieve final completion beyond the extended final completion date;

(c) the consequential damages suffered by the plaintiff by virtue of the delay and failure to achieve final completion within the contracted period; and

(d) the contractual entitlement of the plaintiff to encash the performance bank guarantee pursuant to art 14 of the contract.

[16] The plaintiff further alleged that the products supplied by the defendant were faulty and defective resulting in the plaintiff having to incur extra costs to either rectify the product or replace them with new products (see Items A, B, C, D and D(i) of plaintiff's statement of claim in bundle of pleadings ('BOP') pp 23–27, and correction of the plaintiff's claim by PW2 in answer 14 of his amended witness statement, PW2-WS).

[17] The plaintiff therefore claims the total aggregate cost, loss and damages incurred and/or to be incurred by the plaintiff ie the sum of RM21,355,383 (USD6,570,887), being the total amount claimed by the plaintiff from the defendant for the following:

(a) the cost and expenditure incurred due to faulty equipment for the sum of RM605,343 (USD186,259.39) (CBOD Pt B pp 537–584);

(b) the cost and damages incurred due to delay and failure to achieve final completion for the sum of RM3,898,210 (USD1,119,449.20) (CBOD3 Pt B pp 585–666); and

(c) the additional cost incurred on equipment due to technical failure to achieve final completion for the sum of RM16,979,268 (USD5,194,784) (CBOD3 Pt B pp 667–768 and pp 769–891).

DEFENDANT'S DEFENCE AND COUNTERCLAIM

[18] In essence, the defendant's defence is that:

(a) the defendant did not breach the contract. The defendant could not complete the works by the 30 April 2014 (delay default date) because the plaintiff did not comply with their obligations under the contract;

(b) there is an express and/or an implied term in the contract that the plaintiff must provide the defendant with utilities and raw materials to enable the defendant to complete the acceptance testing. This the plaintiff did not comply, thereby preventing the defendant from performing their obligations under the contract;

(c) the plaintiff deliberately prevented the defendant from completing the acceptance testing on 3 May 2014 to avoid paying the defendant the balance sums due under the contract; and

(d) the termination of the contract on or about 3 June 2014 was wrongful because it was done to prevent the plaintiff from performing their obligations despite the plaintiff knowing that the defendant could perform the contract.

[19] The defendant's counterclaim is that:

(a) the defendant is entitled to the balance sums due under the contract because the defendant could have performed their obligations, but was prevented from doing so by the plaintiff; and

(b) the defendant is entitled to all its claims as stated in its counterclaim at BOP p 64.

ISSUES

[20] The main issue is whether it is the plaintiff or the defendant who had breached the contract to entitle the other innocent party to its claim or counterclaim, as the case may be.

[21] In order to determine this issue, the court would consider whether the defendant has achieved or performed its contractual obligations regarding the following important milestones:

(a) mechanical completion (section 10.2 of the contract, CBOD Pt A p 25);

(b) acceptance testing (section 11.2 of the contract, CBOD Pt A p 26);

(c) final completion (section 10.3 of the contract, CBOD Pt A p 25);

(d) guaranteed final completion date (Schedule I, CBOD Pt A p 47);

(e) extended final completion date ie 15 January 2014 (CBOD Pt A p 111); and

(f) delay default date ie 30 April 2014 (Schedule I, CBOD Pt A p 46).

ANALYSIS AND FINDINGS

[22] The plaintiff would succeed in its claim if it can prove that the defendant had failed to complete the two stages of mechanical completion and acceptance testing on/before 30 April 2014 (delay default date).

Whether the defendant completed mechanical completion

[23] Pursuant to section 10.2 of the contract, mechanical completion is to be achieved by the defendant on/before 1 December 2013.

[24] The plaintiff contends that final completion did not occur as mechanical completion was neither achieved by the defendant on/before the extended final completion date nor on the delay default date, as there were still numerous physical ongoing as well as additional work required to be done which would significantly impact on the performance and operation of the LEF.

[25] Dr Calvin Chok Vui Soon ('PW2'), the engineer and director of technology for the plaintiff in relation to the contract, in his re-examination referred to the email from one Lijo Paul, ie the defendant's representative, dated 14 January 2014 (CBOD1 Pt B p 119) where Lijo Paul stated that the 'VFD is not functioning properly' on 3 January 2014. 'VFD' stands for variable frequency drive, which is the pump. PW2 explained that this means that as on 3 January 2014, the defendant had already faced a problem to pump the feedstock from the tank T-9 into the LEF. Therefore, the oil was not able to move.

[26] PW2 also referred to the email from one Ash, the plaintiff's plant manager, dated 14 November 2014 (CBOD1 Pt B p 121) where Ash requested for additional budget so that they could do the additional works stated in the same email, which works would cost RM150,000 on major items to be done on steam tracing and insulation which were requested by the defendant on 14 January 2014 and 15 January 2014. According to PW1, this steam tracing and insulation are essential for the operation of the plant.

[27] Based on the above evidence adduced by the plaintiff, it appears to be that mechanical completion could not have been possibly achieved on/before 1 December 2013.

[28] The plaintiff submits that mechanical completion was still not achieved in April 2014 as work by the defendant to reduce the LEF problem with acid vapour was still ongoing, well beyond the extended final completion date. PW2 referred to the email from Ash to Rajan Skhariya ('DW1'), the defendant's director and engineer for the EPCC project, dated 14 April 2014 (CBOD2 Pt B p 320) where Ash stated that the previous problem of acid vapours has been greatly reduced.

[29] The plaintiff further relies on the corroborative evidence of the independent expert witness appointed upon agreement by both parties, ie Jun Cruz ('PW3'), who stated that when he visited the plant site, it was surrounded with acidic mist due to the faulty LEF equipment which had made it difficult to work and created an unsafe environment.

[30] PW3's report dated 6 August 2014 (CBOD3 Pt B pp 477–501) was made after three site visits but the report did not state the dates of the three site visits. The report was based on site observed data for four hours dated 27 March 2014 taken by one company called Mechmar at the plant site.

[31] The plaintiff submits that the terms of the contract, in particular sections 10.2 and 10.2(g), specifically require the certification of completion of the various steps of mechanical completion by the defendant. Yet, there is no such certification and there is no explanation from the defendant for its absence.

[32] On the other hand, the defendant contends that mechanical completion was indeed achieved by the defendant. The defendant relies on the following documents:

(a) the email dated 20 December 2013 from the plaintiff's project manager, Ash, to the project coordinator, Mary (CBOD1 Pt B p 46) where the plaintiff acknowledged that mechanical completion would be achieved on 23 December 2013. It is observed that in that email, Ash, inter alia, stated:

> We will have a 'all-workers' gathering at 10.45AM on Monday, 23 December 2013, to officially declare that the RRLE project has reached 'mechanical completion' and that full plant commissioning will immediately follow, these after, the acceptance testing which will lead to 'final completion';

(b) the above was acknowledged by another email from the plaintiff dated 20 December 2013 (CBOD5 Pt B Tab3) regarding the Layer Ester

Process Line Kick Off Assembly on 23 December 2013 at 10.30am. This was confirmed by Anbananthan a/l Shanmugam ('PW1'), the plaintiff's chief operating officer;

(c) the defendant wrote an email to the plaintiff dated 27 December 2013 stating that mechanical completion was achieved on 23 December 2013 (CBOD5 Pt B Tab 4). The plaintiff did not dispute the contents of this letter;

(d) after the defendant had sent the above email, the parties signed addendum No 1 (CBOD Pt A pp 111–113) dated 31 December 2013. No mention was made in addendum No 1 about mechanical completion not being achieved. Instead, it stated that the guaranteed final completion date was 15 January 2014;

(e) this can mean that on the date that addendum No 1 was signed, the mechanical completion was already achieved because there is no way that the guaranteed final completion can be achieved by 15 January 2014, if the mechanical completion was not already achieved by 31 December 2013;

(f) PW1 in his email dated 7 March 2014 (CBOD1 Pt B p 139) stated at the item under the heading 'Thermic Fluid System ('TB2') Operations' that 'Mecpro's attempts to repair the two pumps up to the 14th had failed. In order to keep the acceptance testing progressing ...'.

From the above emails, it is clear that as at 14 January 2014, the acceptance testing was already underway. Acceptance testing cannot commence unless mechanical completion is already achieved;

(g) PW1 acknowledged that the plaintiff did not send any letter disputing that mechanical completion was indeed achieved by the defendant;

(h) the plaintiff did purchase raw materials for the purposes of acceptance testing (CBOD1 Pt B pp 47–49). PW1, in cross-examination, acknowledged that these raw materials were used for acceptance testing; and

(i) PW1 acknowledged that mechanical completion was done either at the end of December 2013 or early January 2014.

[33] From the evidence adduced by both parties, I find that despite the plaintiff's contention that the VFD was not functioning properly on 3 January 2014, and also the fact that Ash had asked for an additional budget to carry out the additional works requested by the defendant on 14 January 2014 and 15 January 2014, the evidence of the defendant as enumerated in paras 32(1)–(9) above is overwhelming to prove that mechanical completion was already achieved by the defendant by the end of December 2013, or in

early January 2014. Otherwise, PW1 would not have stated in his email about keeping the 'acceptance testing progressing' as on 7 March 2014.

[34] It appears to me that while the plaintiff was not completely satisfied with the mechanical completion, and even in the absence of certification by the defendant of the various steps of mechanical completion by the defendant, the plaintiff did not dispute it, but instead had gone ahead with the defendant to the next stage of acceptance testing. The plaintiff therefore has waived its right to dispute the matter. It is now not open to the plaintiff to deny that mechanical completion was not achieved by the defendant before the acceptance testing commenced.

Whether the defendant had completed acceptance testing

[35] The plaintiff contends that the defendant did not complete the works on/before 15 January 2014 ie the guaranteed final completion date, and further did not complete the works before 30 April 2014 ie the delay default date. The LEF was not operational by 30 April 2014. This entitles the plaintiff to terminate the defendant's contract.

[36] The defendant admits that it must complete the works by 30 April 2014 (delay default date). However, the defendant contends that the plaintiff had failed to fulfil its obligations to enable the defendant to complete the works.

[37] The plaintiff's obligations stipulated in Schedule II to the contract are:

(a) the plaintiff would provide 1400 metric tonne ('MT') of Sludge Palm Oil ('SPO') and 11400 MT of Palm Fatty Acid Distiller ('PFAD') in accordance with Table A (CBOD Pt A p 51);

(b) all utility services such as steam, water, cold water, chilled water, Thermic Fluid ... shall be provided by the owner ('the plaintiff') (CBOD Pt A p 52);

(c) temperature of the Thermic Fluid should be maintained at 275°C (CBOD Pt A p 51); and

(d) testing must continue for a period of 72 hours (CBOD Pt A p 51).

[38] The court agrees with the defendant's submission that in view of Schedule II, there is an express and/or implied term in the contract that the defendant's obligation to complete acceptance testing must be subject to the plaintiff fulfilling its obligations first.

[39] The court would now consider whether the plaintiff had fulfilled its obligations in the following matters raised by the defendant:

(I) The plaintiff's failure to provide a thermal boiler that could supply adequate heat energy for the LEF to operate at full capacity

The temperature provided by the plaintiff could not be maintained at the required temperature of 275°C on a sustained basis. This is shown by the evidence below:

(a) in the defendant's letter dated 25 February 2014 to the plaintiff (CBOD1 Pt B pp 133–134);

(b) vide its letter dated 4 March 2014, which is before the delay default date of 30 April 2014, the defendant stated that the works could not be completed because of the thermal boiler ('TB') issue (CBOD1 Pt B p 135);

(c) the defendant again reiterated this fact in DW1's email dated 8 March 2014 to PW1 (CBOD1 Pt B p 139) where he stated:

> 'In fact, during last two trials, when the feed capacity was raised over 10 MT/Hr, thermal boiler couldn't provide the required temperature, hence we were unable to analysis any other inefficiency in the plant on higher capacity of 12.5 MT/Hr, is why we requested to keep a person from thermal boiler side to avoid any interruption in the thermal boiler process.';

(d) an email from Ash, the plaintiff's project manager, dated 28 March 2014 (CBOD1 Pt B p 154 at para 1) to the defendant where he stated:

> 'When the plant feed was raised to 8.5 MT/Hr there was a loss of temp in the Layer Ester vessels and the DEO ... This drop in temperature in the process has been attributed to the Thermic Fluid Heater (TB2) ...';

(e) the thermic fluid heater was supplied by the plaintiff;

(f) the plaintiff's whatsapp message on 31 March 2014 at 11:56:24am states that 'after two hours feed to le 12 mt, temp at tb*2* drop. So, feed reduce back to 11mt.';

(g) there were temperature fluctuations shown in CBOD3 Pt B pp 431–433; and

(h) PW1, in his cross-examination, confirmed that if there is a drop in temperature, it would affect acceptance testing (NOE p 104 line 4–7).

[40] From the above evidence adduced by the defendant, it is shown that even after the guaranteed final completion date of 15 January 2014, and even on as late as 31 March 2014, the thermal boiler supplied by the plaintiff could not provide sufficient heat, and this had prevented the defendant from achieving the acceptance testing by 30 April 2014 (delay default date).

[41] The plaintiff relied on the report of PW3 (CBOD3 Pt B pp 477–501), the independent expert from Sulzer, who was appointed upon agreement by both parties in May–June 2014, to show that the thermic fluid heater supplied by the plaintiff is adequate to meet the demands of various unit operations.

[42] However, this court is unable to accept PW3's report for the following reasons:

(a) the report was based on a set of parameters given by Sulzer Singapore to PW3. Those parameters were not attached to the report in CBOD3 Pt B;

(b) PW3's calculation of the thermal oil heater energy output was based on Mechmar site observed data for four hours on 27 March 2014 taken at the plant site (CBOD3 Pt B p 487, and NOE 2 p 2). The data was given in a document format, but was not produced in the report (NOE 2 p 50). Mechmar was not called as the plaintiff's witness. PW3 merely explained that data provided by Mechmar was not included in the report because it was an informal document. There is no explanation as to why Mechmar gathered the data observed over four hours only. Schedule II of the contract clearly stipulates that testing must continue for a period of 72 hours (see para 37(4) above);

(c) PW3 admitted that when he went for the plant site visit, the plant was in operation and commercially running (NOE 2 p 53);

(d) PW3 admitted that he cannot verify the flow rate of the thermic fluid when the defendant was still at the plant site because PW3 was not there at the material time, and no such data was given to him. Therefore, PW3's use of the pump curve is a theoretical calculation, and not an actual calculation of the flow rate of the thermic fluid at the material time when the defendant was still at the plant site;

(e) PW3 acknowledged that if the flow rate drops, the heat generated is reduced; and

(f) when shown data that on 21 March 2014, the temperature had dropped to 216°C, PW3 acknowledged that this temperature is quite far from the 283°C used in his report (NOE 2 p 86).

[43] The court is convinced by the defendant's argument that since PW3 cannot tell the flow rate at the time when the defendant was at the plant site, PW3 cannot tell what was the actual heat generated or the temperature when the defendant was on site (NOE 2 p 80). Even PW3, in his cross-examination, admitted to this. PW3 also did not know why the data provided by the company, Mechmar, was for a short period of only four hours on 27 March 2014, which was about four months before PW3's site visit (NOE 2 p 84)

[44] PW3 admitted that his report shows the performance of the thermal boiler at the date when he went for inspection at the plant site. However, the report does not address the question why the temperature fluctuated when the defendant was at the site (NOE 2 p 94).

[45] Therefore, PW3's report cannot be relied upon or accepted by this court.

[46] The defendant submits that the plaintiff deliberately prevented the defendant from completing the acceptance testing. However, there is no cogent evidence adduced to prove that allegation.

[47] From the evidence adduced, it is clear that the plaintiff did not fulfil its obligations under the contract by not providing the thermal boiler that could provide the required heat energy and temperature to enable the defendant to complete the acceptance testing and for the LEF to operate at full capacity. This delay went on until the delay default date on 30 April 2014.

(II) The plaintiff's alleged failure to complete heat tracing line, insulation work and failure to provide sufficient leaf filter on working condition

[48] There is insufficient evidence adduced by the defendant on the above allegation. Here, the court accepts the plaintiff's submission that the defendant, being the turnkey general contractor, is solely responsible for the design of the LEF (CBOD Pt A p 58) and in establishing every single equipment required for the EPCC project (CBOD Pt A pp 53–54). The plaintiff relied solely on the defendant's expertise and management of the same.

[49] The defendant required new additions on 15 January 2014 to the original design and layout submitted by the defendant under the contract. The plaintiff cannot be held responsible for any delay caused by the defendant's need to address issues regarding the original design and layout of the LEF.

(III) The plaintiff's alleged failure to provide sufficient utilities, feedstock and consumables pursuant to the contract

[50] Here again, the court agrees with the plaintiff's submissions.

[51] Under Schedule II of the contract (p 51 of the contract), on acceptance testing, it stipulates that the plaintiff shall provide at its cost 1400 MT of SPO and 1400 MT of PFAD for purposes of the acceptance test. However, section 11.2.3 of the contract stipulates that if the defendant has exhausted the feedstock, and acceptance test failed and has to be repeated, the defendant has to bear the cost of additional feedstock and consumables (CBOD Pt A p 26).

[52] Schedule II of the contract further stipulates under Item (iii) of the 'details of the acceptance test procedure' (CBOD Pt A p 51) that any off spec (ie off specifications) product produced may be reused by the defendant as feedstock in subsequent trials for acceptance test.

DW1, during cross-examination by the plaintiff's counsel, has stated:

> PC: Now, 20 (f) you said 'plaintiff supplied used cooking oil mixed oil for process which was not part of the EPCC Agreement.' My question to you is you didn't dispute did you when you took the used cooking oil from the plaintiff? Did you dispute or not?
>
> A: Not dispute.
>
> (NOE dated 23 and 24 November 2015).

Therefore, in the absence of any express agreement by the plaintiff to bear the additional cost of feedstock, or any objection raised by the defendant to the use of other feedstock, the defendant has to bear such additional cost, and is now estopped from disputing the same.

(IV) The plaintiff's direction to add 1% phosphoric acid which eventually caused other equipment to start corroding and interfere in the commissioning

[53] Table B of Schedule II of the contract provides for the plant acceptance criteria that allows for the use of 1% phosphoric acid for sludge palm oil (CBOD Pt A p 51). The plaintiff submits that consumption of phosphoric acid is within the allowable rate under the contract. On the face of the provision in Table B, this appears to be the case. However, this issue must be considered with the following related issue:

(V) The acidic mist and odour from the plant which cause irritation of the eye and deteriorate the working atmosphere several times

[54] Under section 4.11 of the contract (CBOD Pt A p 17), it is the defendant's obligation to comply with, among others, the requirement pertaining to environmental protection. It is therefore incumbent upon the defendant to ensure that the LEF is operated in a safe and prudent manner.

[55] However, the court accepts DW1's unrebutted evidence that the plaintiff kept the defendant in the dark and had used the wrong level of phosphorus. The plaintiff failed in the gum break test by adding 1:1 ratio ie instead of 3kg phosphoric acid, the plaintiff added 1,000kg phosphoric acid. 'There is no such experiment prevailing in the world', according to DW1. This failure by the plaintiff caused the environment to be unsuitable for work and

disrupted the defendant's acceptance testing. The plaintiff did not heed the defendant's advice to remedy the situation, but opted to follow another consultant instead.

(VI) The plaintiff's alleged failure to provide sufficient storage facility to store finished off spec product

[56] There is no cogent evidence adduced by the defendant on this. The court accepts the plaintiff's submission that the plaintiff has provided and allocated sufficient storage. However, due to the volume of off spec products generated by the defendant, the storage has to be also used to store the off spec products.

(VII) Pipeline modification of economisation for fatty acid spray done by defendant to compensate less heat energy produced by thermal boiler; cooling tower, blade adjustment, change of water pump and thermal boiler tuning, and cooling tower was under capacity

[57] Whilst it is true that pursuant to sections 11.3.2 and 11.5 of the contract (CBOD Pt A p 27), it was the duty of the defendant to, at its cost and expense, remedy the LEF and achieve final completion of the LEF including in the event that there was design or construction defect (CBOD Pt A p 28), in this matter, due to the plaintiff's failure to provide the required heat and temperature, the defendant had to embark on the above modification and economisation. The defendant cannot be faulted here.

(VIII) The immigration problem prevents defendant's engineers from entering into Malaysia for six months

[58] It is the defendant's responsibility to ensure that there is sufficient manpower for the EPCC project. The plaintiff's obligation is merely confined to bearing agreed costs on the same as per the terms of the contract. Section 3.1.12 of the contract stipulates that it is the defendant's obligation to provide all activities, services, and items necessary to ensure that the LEF achieve mechanical completion.

(IX) The plaintiff's refusal to allow the defendant to complete the project by instructing the defendant to vacate the plant by 7 June 2014

[59] The defendant had not completed the project prior to and beyond the delay default date, and was requested to vacate the plant. However, this was not attributable to the defendant since it is the plaintiff who had breached the contract, as considered in (I), (V), and (VII) above.

(X) The plaintiff's failure to obtain the necessary government authorisation and/or authorisation from the Department of Safety and Health ('DOSH')

Force majeure event

[60] The defendant's defence includes the occurrence of force majeure. Section 13.5 of the contract provides for force majeure as follows:

13.5 Force Majeure; Failure of Authorisations.

13.5.1 Effect. Any delays in or failure of performance by a party, other than the obligations to pay monies hereunder, shall not constitute a default hereunder if and to the extent such delays or failures of performance are caused by force majeure events.

13.5.2 Notice of occurrence and effect.

13.5.2.1 Notice of occurrence. Any party claiming that a force majeure condition has arisen shall immediately notify the other party of the same, shall act diligently to overcome, remove and/or mitigate the effects of the event of force majeure, shall notify the other party on a continuing basis of its efforts to overcome, remove and/or mitigate the event of force majeure and shall notify the other party immediately when said condition has ceased.

13.5.2.2 Notice of impact. In addition to its obligations under section 13.5.2.1, if contractor claims there is a force majeure event, contractor shall (i) promptly notify owner, in writing of the nature, cause and cost of such force majeure event, (ii) state whether and to what extent the force majeure event will delay the guaranteed final completion date or the delay default date, (iii) state the date and time the force majeure event commenced; and (iii) state whether contractor recommends that owner initiate a change order pursuant to art 8.

13.5.3 Effect of force majeure. No failure or delay in performance under this agreement shall be deemed to be a breach hereof to the extent such failure or delay is occasioned by or due to force majeure. With respect to delay in performance, a force majeure condition shall excuse such delay in performance on a day to day basis for a period of time equal to the duration of the Force Majeure event or the period need to remedy its effects, to the extent that such force majeure event causes a delay in the work.

13.5.4 Termination. In the event that (a) contractor or owner are denied any required authorisations, or such authorisations are obtained, but are withdrawn, or contain restrictions, qualifications, or conditions that would have a material adverse effect on the benefits or obligations of the parties, and the parties are unable to reform this agreement or agree upon other

mutually acceptable arrangements, or (b) if a force majeure event continues for more than 60 days after notice of the event of force majeure is given under section 13.5.2, then owner may terminate this agreement, in its sole discretion, at any time within 60 days after the conditions in the foregoing (a) or (b), by giving at least 14 days prior written notice to contractor.

13.6 Right to termination. Contractor shall have no right to terminate this agreement for cause or otherwise except as described in section 13.4.

13.7 Effect of termination under section 13.5 ...'.

[61] The defendant, as the contractor, has the right to terminate the contract under section 13.5.4 on ground of force majeure. The question is whether there is an occurrence of a force majeure event which entitles the defendant to claim the same.

[62] Under section 5.4.4 of the contract, the 'owner shall apply for and obtain all the necessary Malaysian governmental authorisations required for the layer esterification facility as set out in Schedule VII'.

[63] Pursuant to section 4.16 of the contract, the defendant shall provide the necessary documents or information required by the government authority as needed by the plaintiff in applying and procuring any Malaysian governmental authorisation.

[64] The plaintiff contends that, however, due to delay by, and incomplete documents provided by the defendant, it resulted in the application being rejected. This can be shown in various correspondences between the plaintiff's agent and the defendant. Even up to May 2014, the defendant was still unable to provide the required documentation (CBOD 1 Pt B p 197, and CBOD2 Pt B pp 210 and 220).

[65] The plaintiff submits that the failure to obtain DOSH approval (which is denied) is not fatal at all. The defendant up to the time when they were requested to vacate (the defendant vacated on 3 June 2014), the plant had never stopped working pending DOSH approval. The plaintiff further submits that the government authorisation was only required upon commercial production, and there was no evidence adduced by the defendant to show that the government or relevant authorities had requested the plaintiff to stop working on the project.

[66] The plaintiff also submits that pursuant to section 13.5 of the contract, failure in authorisation and/or force majeure does not constitute a default

under the contract. Hence the defendant's allegation that their delay in completing the project was due to force majeure cannot stand. Pursuant to section 13.5.2.2, in the event of force majeure, the defendant shall promptly notify the plaintiff in writing, but the defendant did not do so.

[67] On the other hand, the defendant showed overwhelming evidence of its 25 letters/emails from 26 August 2013–15 July 2014 to the plaintiff (see DW1-WS A24) to prove that the plaintiff had not obtained the government authorisation and/or authorisation from DOSH as of 15 July 2014.

[68] The plaintiff did not rebut DW1's evidence that in the minutes of the meeting dated 11 December 2013, the plaintiff decided that the LEF project should proceed without the government authorisation and/or DOSH authorisation. This decision was made without the consent of the defendant, and in breach of the contract (CBOD Pt B p 249).

[69] Under section 5.3 of the contract, if the plaintiff is denied a required authorisation, parties are to reform the agreement. If parties are unable to reform this agreement, section 13.5 (Force Majeure; Failure of Authorisation) shall apply.

[70] Pursuant to section 13.5.3 of the contract, no failure or delay in the performance of the contract shall be deemed to be a breach of the contract if it is due to force majeure. In this case, the plaintiff failed to obtain the required governmental and/or DOSH authorisation. This is in breach of the contract. The parties did not reform the contract. This entitles the defendant to treat it as a force majeure event. However, the defendant did not give the written notification of it to the plaintiff as required by sections 13.5.2.1 and 13.5.2.2 of the contract. Therefore, the defendant cannot now rely on the defence of force majeure here.

[71] Notwithstanding the defendant's failure to notify the plaintiff of the force majeure event, the court notes that between 1 May 2014 and 3 May 2014, the defendant had performed the acceptance testing and produced products which met all 'specs' (CBOD1 Pt B p 183). This was confirmed by the defendant's letter to the plaintiff. The plaintiff never disputed this.

[72] However, after achieving the targets for a period of between 37–43 hours, the plaintiff asked the defendant to stop testing for an alleged DOSH inspection.

[73] On record, the plaintiff failed to produce any documents to prove that there was in fact such a DOSH inspection.

[74] It is therefore highly probable, as submitted by the defendant, that the plaintiff prevented the defendant from completing the acceptance test, by using the DOSH inspection as an excuse, because the plaintiff did not want to pay the defendant the balance payment due under the contract.

[75] The plaintiff submits that the defendant failed to plead the issue that the defendant was deliberately prevented from completing the acceptance test by the plaintiff claiming the DOSH inspection. I do not think that that is fatal. The matter of the requirement for a DOSH inspection can be covered by the defendant's defence and counterclaim in paras 11 and 13(a) on the plaintiff's failure to obtain the authorisation from DOSH.

(XI) The plant is operational

[76] PW3 confirmed that when he went for a site visit, the plant was operating commercially (NOE 2 p 53). PW3 is the plaintiff's witness. No other witness from the plaintiff has rebutted what PW3 stated. Therefore, PW3's evidence can be accepted, that the modified plant is in working condition. This means that the defendant has fulfilled its obligations under the contract.

[77] After considering the matters in (I) to (XI) above, on a balance of probabilities, I find that the plaintiff has failed to prove its case against the defendant. The evidence shows that it is more probable that the plaintiff had failed to fulfil a major part of its obligations under the contract, in particular in the matters in (I), (V), (VII), and (X) (see paras 71–75) above. Therefore, the plaintiff, being the contract breaker, had wrongfully terminated the contract. It follows that the plaintiff's claim cannot succeed.

[78] PW1 gave evidence that in February 2014, the plaintiff had given notice to the defendant for non-completion of the project. From February to May 2014, there was ongoing rectification work by the defendant. It is observed that the plaintiff took the position that if the contract was not performed by 30 April 2014, then the contract is automatically terminated. However, it is further observed that the plaintiff did not terminate the contract on 30 April 2014. Between 30 April 2014–2 June 2014, the plaintiff had allowed the defendant to continue with the acceptance testing and doing the rectification work. The defendant was asked by the plaintiff to vacate the plant site by 7 June 2014, but the defendant vacated the plant site on 3 June 2014. The plaintiff only formally gave the letter of termination to the defendant on 9 October 2014. On 10 October 2014, the plaintiff filed this action against the defendant.

[79] From the evidence adduced, it can safely be concluded that the plaintiff, by its conduct, did affirm the contract from 30 April 2014 – 6 June 2014 (ie the day before the defendant was required to vacate the plant site).

[80] It is to be noted that when the deadline of 30 April 2014 was no longer applicable, even though the plaintiff had allowed the defendant to continue with the acceptance testing, as submitted by the defendant, there was no new timeline or deadline that was agreed to by both parties. This leaves the contract with an open-ended completion date.

[81] The plaintiff submits that the defendant cannot, as an afterthought, raise the issue of the plaintiff's affirmation of the contract since affirmation was not pleaded by the defendant. However, it is noted that in para 13 of the defence and counterclaim, the defendant had pleaded that it had requested for an extension of time for the said project based on the plaintiff's breach of the contract, and/or due to the occurrence of force majeure. In para 23 of the same, the defendant pleaded that through the plaintiff's conduct, the plaintiff has expressly and/or impliedly extended the time period for the contract. Further, in para 24, the defendant has pleaded that due to the extension of time for the contract, the termination by the plaintiff was an unlawful termination. I am therefore of the opinion that the defendant has sufficiently pleaded the plaintiff's affirmation of the contract.

[82] The next question that arises is whether the plaintiff, after having allowed the defendant to continue with acceptance testing from 30 April 2014 onwards without a deadline or a completion date, can suddenly terminate the contract by asking the defendant to vacate the plant site by 7 June 2014.

[83] The following provisions of the contract are relevant:

> 11.2.3 Acceptance Testing Period; Repeat Test. Contractor or owner, subject to the provisions of this s 11.2.3 and Schedule II, may repeat an acceptance test as contractor or owner, as the case may be, deems appropriate; provided, that all acceptance tests must be completed within 15 days after the layer esterification facility achieves mechanical completion (in this agreement called the 'acceptance testing period'), unless: (a) the parties agree otherwise in writing; or (b) the acceptance testing period is extended by force majeure, but not beyond the delay default date ...;
>
> 11.4 Guaranteed final completion date; delay default date. Contractor hereby guarantees that final completion shall occur on or before the guaranteed final completion date. In the event final completion does not occur by the guaranteed final completion date, then contractor shall pay to owner liquidated damages at the rate 0.5% of the contract price for each week or part thereof beyond the guaranteed final completion date that the final completion has not been achieved. If the layer

esterification facility fails to achieve final completion by the delay default date, then this shall be a contractor event of default as provided in s 13.1.5'

ARTICLE 13 — DEFAULTS; REMEDIES; TERM; TERMINATION

13.1 Contractor event of default. The occurrence of any of the events set forth below shall constitute a 'Contractor event of default' under this agreement:

13.1.1 Bankruptcy. ...

13.1.2 Failure to perform. Contractor shall have defaulted or breached any provision of this agreement, including, without limitation, any of its agreement, covenants and obligations hereunder, and shall have failed to cure such default or breach within 14 days following delivery to contractor of a notice from owner to cure such default; or

13.1.3 Representation false ...

13.1.4 Failure to achieve final completion. If final completion is not achieved by the delay default date; or

13.1.5 Failure to obtain authorisation ...

13.1.6 Creditors etc. ...

13.2 Owner's default remedies against contractor. If a contractor event of default shall have occurred, owner shall have the right (in addition to and without prejudice to all other rights and remedies available to owner under this agreement and Law) to terminate this agreement by notice in writing to contractor in the event of such termination:

13.2.1 If requested by owner, contractor shall withdraw from the site, shall assign to owner (without future recourse to contractor) such of contractor's subcontracts as owner may request, and shall remove such materials, equipment, tools and instruments used and any debris or waste materials generated by contractor in the performance of the work as owner may direct, and contractor shall promptly deliver to owner all designs, drawings and other documents related to the project, including, without limitation, the documents stipulated in s 4.17. In the event of such termination, contractor shall deliver to owner all equipment, materials, machinery and components to the layer esterification facility delivered to or located at the site. To the extent any specific item of the work is partially complete at the time of termination, at the option of owner, contractor shall (i) complete such partially completed work and/or (ii) transfer and deliver to owner such partially completed work free from all liens, claims and encumbrances whatsoever. In such event, owner shall pay contractor the amount that owner would have otherwise paid to contractor for such item

of work had such termination not occurred, less any damages or costs payable by contractor hereunder. A

13.2.2 Owner, without incurring any liability to contractor, shall have the right to have the layer esterification facility brought to final completion. In such event, contractor shall be liable to owner for all incurred costs to owner of achieving final completion, including costs of accelerated or expedited construction/fabrication, installation, testing and/or commissioning activities actually performed in an attempt to achieve final completion (by the guaranteed final completion date if not yet past, or otherwise as expeditiously as practicable), and/or to mitigate any delay by contractor, and actual costs for administering any subcontract and for legal fees associated with the termination ... B C

13.2.3 ... D

13.2.4 Notwithstanding ss 13.2.1, 13.2.2 and 13.2.3, owner shall have the right, exercisable at its option, to demand (i) a full refund of all moneys paid by owner to contractor under this agreement, including, without limitation, all amounts paid towards the contractor price; and (ii) for all losses and damages suffered or incurred by owner, whereupon contractor shall, within seven days of such demand, (a) refund or cause to be refunded to owner all such moneys paid by owner; and (b) pay to owner all such losses and damages, and upon such refund and payment being duly made in full, ownership of the layer esterification facility shall vest in contractor (if ownership in the same shall have previously vested in owner), and contractor shall, at its cost and expense, arrange to remove the layer esterification facility from the site (if already delivered to the site). If contractor fails, refuses and/or neglects to remove the layer esterification facility from the site within 14 days of such refund and payment being made, owner shall be entitled, at the cost and expense of contractor, to arrange for the layer esterification facility to be delivered to contractor (FOB Port Klang, Malaysia) or to otherwise deal with the layer esterification facility as owner deems fit and contractor shall not have any claim whatsoever against owner in respect thereof. ... E F G H

13.2.5 Notwithstanding the availability and/or exercise of the foregoing remedies, owner shall have all such other remedies available under applicable law, including, without limitation, the right to claim for damages. I

13.3 Owner's event of default. Each of the following shall constitute an 'Owner's event of default':

13.3.1 Bankruptcy. ...

13.3.2 Failure to perform. Owner's failure to perform any of its material obligations under this agreement, and such failure is not cured within 21 days after receipt of written notice thereof from contractor, or if a cure cannot be effected within such 21 day period, such period shall extend for a reasonable period of time, but not to exceed a total of 60 days, so long as owner is proceeding diligently to cure such default throughout such period.

13.4 Contractor remedies for owner event of default. Subject to the rights granted in s 13.5, upon the occurrence of an owner event of default and which is continuing, contractor shall have the right to terminate this agreement; to stop work and remove all its tools and equipment from the site, and/or pursue all such remedies as may allowed under this agreement, at law or in equity. In addition, and without limiting the foregoing remedies, owner shall pay to contractor the amount for the work which has been duly completed as of the date of termination. Upon such payment by owner, owner shall have exclusive ownership of and rights to the layer esterification facility and the work (if such ownership and rights have not previously vested in owner pursuant to the provisions of art 6) and the documents stipulated in s 4.17 and contractor shall have no further claims with respect thereto.

[84] From a reading of section 11.2.3 of the contract, acceptance tests must be completed within 15 days after mechanical completion has been completed. In this case, acceptance testing was not completed within the requisite 15 days, and even after the 15 days. Both parties had then agreed in writing to extend the deadline for completing acceptance testing to the delay default date of 30 April 2014. Section 11.2.3 does not allow and does not envisage acceptance testing to be 'beyond the delay default date'.

[85] Thus, when acceptance testing was not completed by 30 April 2014, the delay default date, the innocent party should decide whether to go on with the contract or otherwise.

[86] Regarding this situation, guidance is found in the case of *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420 where at pp 6–7, the Court of Appeal, inter alia, stated as follows:

> [9] But a breach is not an actionable breach unless it is accepted by the innocent party to the contract — here the plaintiff. As Seah FJ observed in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 at p 296:
>
> > A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called *brutum fulmen* that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party

> if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent (per Lord Wright in *Edridge v Sathna* (1933) 60 IA 363).

[10] So in the state of affairs in which the plaintiff found itself on 29 May 1996, it had a choice: either to treat the contract as at an end or to elect to perform the new contract. This is in accordance with Contracts Act 1950 s 40 of the which reads:

6 MLJ 420 at p 428

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
>
> ...

[11] For an election to be effective and binding, the innocent party must by words or conduct communicate his decision to the contract breaker. In other words it may be express or implied from conduct. To quote Mason J (later CJ Australia) in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at p 655:

> Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*The Queen v Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v Goonan* [1964] 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

[12] Absent an express election, the test for deciding whether the innocent party elected one way or the other is objective. Put another way, it is for the court to infer from the surrounding circumstances of each case as to whether the innocent party elected to affirm in the continuance of the contract or to treat the contract as at an end. ...

[13] ...

[14] On the other hand, if, for example, the innocent party issues a writ against the contract breaker, that act may be treated as being sufficient evidence of an intention on the part of the former to treat the contract as at an end and a sufficient communication of that intention to the latter. See, *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308, where Chang Min Tat FJ said that it was:

> a notice of rescission when the contractor served the writ and statement of claim herein on the developer and that by his statement of defence, the developer had accepted such a notice as effectively terminating the contract between the parties.

[87] Applying the principles in *Mintye Properties*, only the innocent party has

the choice, either to treat the contract as at an end, or elect to perform the new contract. In this case, the plaintiff, having breached the contract by not providing the contractor/defendant with the required heat and temperature from the Thermal Boiler for the thermic fluid, is not the innocent party and therefore has no right to terminate the contract. At all times, the defendant wanted to continue with the contract, but was asked by the plaintiff to vacate the plant site by 7 June 2014. The defendant, being the innocent party did not treat the contract as at an end. However, when the plaintiff filed this writ action, the defendant decided to file its counterclaim. The counterclaim can be treated by this court as sufficient evidence of the defendant's intention to treat the contract as at an end and a sufficient communication of that intention to the plaintiff.

[88] Since the plaintiff is in breach of the contract, there is no 'contractor event of default' under section 13.1 of the contract. Therefore, the plaintiff cannot avail itself of the 'owner's default remedies against contractor' as provided in section 13.2 of the contract.

[89] Instead, the defendant can avail itself of section 13.3 of the contract which provides for 'owner's event of default', in particular section 13.3.2 for owner's 'failure to perform', and section 13.4 for 'contractor remedies for owner event of default'.

[90] Pursuant to section 13.4, the defendant as the contractor 'shall have the right':

(a) 'to terminate this agreement';

(b) 'to stop work and remove all its tools and equipment from the site';

(c) 'and/or pursue all such remedies as may be allowed under this agreement';

(d) 'the owner shall pay to contractor the amount for the work which has been duly completed as of the date of termination'; and

(e) 'upon such payment by owner, owner shall have exclusive ownership of and rights to the layer esterification facility and the work (if such ownership and rights have not previously vested in owner pursuant to the provisions of article 6 and the documents stipulated in section 4.17 and contractor shall have no further claims with respect thereto'.

The plaintiff's claim for RM605,343 (USD186,259.39) (CBOD Pt B pp 537–584)

[91] The plaintiff claimed the above sum for the cost and expenditure incurred due to faulty equipment.

[92] This sum cannot be allowed for the following reasons:

(a) as I have already stated earlier, the plaintiff is in breach of the contract and had wrongfully terminated the contract;

(b) this is a turnkey project. The plaintiff's claim under this head can only be made and allowed after the completion of the EPCC project under the contract. The plaintiff has pleaded that a 'punch list' of matters (ie a list of uncompleted items for the project which is to be established by the defendant before mechanical completion is achieved; see definition in section 10.4 of the contract) was given to the defendant on 18 April 2014 for rectification. In the defendant's letter to the plaintiff dated 5 May 2014, the defendant acknowledged that even though mechanical completion had taken place on 23 December 2013, rectification work was still being carried out (CBOD1 Pt B p 179).

However, the plaintiff terminated the contract without giving the defendant the opportunity to complete the contract, including completing any rectification work, if any is yet to be done. Therefore, the plaintiff is not justified to make this claim. But for the plaintiff's wrongful termination of the contract, the defendant would have completed the LEF and all its obligations under the contract;

(c) as submitted by the defendant (see s 11 paras 148–157 of defendant's written submissions), the bulk of this claim is supported by documents of the plaintiff's wholly owned subsidiary company, Platinum Green Chemicals Sdn Bhd, proving their expenses and losses suffered, and not documents of the plaintiff. On the basis of the principle of separate legal entity, this claim cannot be allowed. The plaintiff must prove its own expenses and losses suffered. The expenses incurred and the losses suffered by Platinum Green Chemicals Sdn Bhd, which is a separate legal entity from the plaintiff, cannot be allowed here;

(d) the defendant's letter dated 5 May 2014 to the plaintiff states, inter alia, 'As a matter of fact, the plant had been in operation for the past three months and more than 3,000 MT of in spec product processed'. This was not rebutted by the plaintiff; and

(e) when PW3 visited the plant site some time after June 2014, he found that the plant was operating commercially. This shows that the plaintiff's claim under this head is unjustified and therefore baseless.

DECISION

Court's decision on the plaintiff's claim

[93] In view of the above findings, on a balance of probabilities, the court is satisfied that the plaintiff has failed to prove its claim. The plaintiff's claim is dismissed. Costs of RM15,000 are to be paid by the plaintiff to the defendant.

The defendant's counterclaim

[94] The court's analysis and findings above would also apply to the defendant's counterclaim.

The defendant's counterclaim for performance bank guarantee

[95] Further to the above, it is noted that the plaintiff had wrongly encashed the performance bank guarantee of USD140,000 since the plaintiff is the party which had breached the contract. The defendant is therefore entitled to the payment of the performance bank guarantee by the plaintiff.

The defendant's counterclaim for contractor's bonus

[96] The matter of the defendant's counterclaim for 'contractor's bonus' is governed by s 3 of addendum No 1 (CBOD Pt A p 112). The defendant is only entitled to the contractor's bonus of USD500,000 if:

> 3.(i)(a) Contractor achieves final completion on or before 15 January 2014; and
>
> (b) Contractor achieves 100% of the plant capacity for a continuous period of seven days on or before 15 February 2014 (that is, the upgraded owner's plant shall have clearly demonstrated its capability of refining/processing 300 MTPD of 90% free fatty acids feedstock to a quality of refined bleached deodorized palm oil with a free fatty acids content not exceeding 0.25% and of functioning as per the specifications for a continuous period of seven days),
>
> as evidenced by the upgraded owner's plant's operation logs and provided owner does not dispute that final completion has occurred or the date on which final completion occurred or the date on which 100% of the plant capacity was achieved;
>
> and
>
> (ii)(a) Contractor achieves mechanical completion under the trans-esterification agreement by 31 January 2014; and
>
> (b) the acceptance tests under the trans-esterification agreement in respect of all equipment, components and machinery within the trans-esterification Bio-Diesel facility supplied by contractor and its subcontractors under the trans-esterification agreement shall be successfully completed in accordance with the provisions of the trans-esterification agreement,

and provided owner does not dispute that mechanical completion under the trans-esterification agreement has occurred or the date on which mechanical completion occurred or the completion of the acceptance tests under the trans-esterification agreement in respect of all equipment, components and machinery within the trans-esterification Bio-Diesel facility supplied by contractor and its subcontractors under the trans-esterification agreement.

[97] It is undisputed that acceptance testing was not completed. There is no final completion of the contract on/before 15 January 2014 or on/before the delay default date of 30 April 2014. The plant did not achieve 100% plant capacity by 15 January 2014. Accordingly, the defendant is not entitled to be paid the contractor's bonus.

The defendant's counterclaim for damages for breach of confidentiality, and infringement of intellectual property

[98] Regarding the defendant's counterclaim for damages to be assessed for the breach of confidentiality and/or breach of confidence and/or infringement of the defendant's intellectual property, the court finds this claim to be baseless.

[99] Sections 2.1.10 and 6.1 of the contract provide as follows:

2.1.10 *Intellectual Property*. All intellectual property in and to the Layer Esterification Facility, its process and operations including, without limitation, any intellectual property residing in any equipment, component or machinery within the Layer Esterification Facility are or will be lawfully owned by contractor and contractor grants to owner a perpetual, royalty free, transferrable license to use and operate Layer Esterification Facility without restriction, imitation and interference from any person whosoever. (Emphasis added.);

ARTICLE 6 — OWNERSHIP OF ASSETS

6.1 Ownership of the Layer Esterification Facility. Ownership of and title to the Layer Esterification Facility and each component, equipment and machinery to the Layer Esterification Facility shall pass to and vest in owner upon delivery of the Layer Esterification Facility to the Site.

[100] In view of sections 2.1.10 and 6.1, it is clear that ownership of and title to the layer esterification facility 'shall pass to and vest in owner upon delivery of the layer esterification facility to the site'. The defendant, as the contractor, has granted the plaintiff, as the owner, a perpetual right to use and operate the LEF. There is therefore no breach of confidentiality and/or infringement of the defendant's intellectual property in the LEF.

[101] It is to be noted that it was DW1 personally, and not the defendant, who had filed for patent registration of the LEF in Malaysia on 11 November 2013. The patent was filed by DW1 earlier on 23 August 2013 in India (CBOD1 Pt B pp 35 and 38).

[102] DW1 then assigned the invention of the LEF to the defendant by way of an assignment agreement dated 1 April 2013 (CBOD1 Pt B pp 2–6). However, the plaintiff was never informed of it until after the commencement of this suit.

[103] As submitted by the plaintiff, the assignment agreement appears to be a sham. The recital states that DW1 has filed a patent in Malaysia No PI 2013004065 on 11 November 2013. However, the assignment agreement was made on 1 April 2013, which is earlier than the defendant's patent application. It is illogical and does not make sense. Therefore, the question of the defendant being assigned with the LEF invention on 1 April 2013 cannot arise.

[104] Moreover, the assignment agreement is not stamped. Being an unstamped document, under s 52 of the Stamp Act 1949 it is inadmissible in evidence.

[105] It is further observed that the independent expert witness, PW3, gave evidence during cross-examination that the defendant's invention is not the first in the world as claimed by DW1, since PW3 had seen a similar type in China (NOE dated 23–24 November 2015 p 117). This was not challenged by the defendant.

[106] For the above reasons, clearly, the defendant's counterclaim for damages under this head must fail.

The defendant's counterclaim for damages for loss of reputation

[107] The defendant also counterclaimed for damages for loss of reputation. However, there is no documentary evidence to support this claim. DW1 admitted in cross-examination that he has no documents to prove this claim.

[108] It is further noted that the defendant did not file any suit for defamation against the plaintiff.

[109] Since the defendant has failed to substantiate its claim for loss of reputation, the defendant is not entitled to this head of claim.

The court's decision on defendant's counterclaim

[110] The court decides on the defendant's counterclaim (BOP pp 64–65) as follows:

Prayer 59 (i)	:	Allowed.
Prayer 59 (ii)	:	Allowed.
Prayer 59 (iii)	:	Allowed.
Prayers 59 (iv), (v) and (vi)	:	Dismissed.
Prayer 59 (vii)	:	Allowed.
Prayer 59 (viii)	:	The plaintiff is ordered to pay the defendant costs of RM15,000 for the counterclaim.

Order accordingly.

The plaintiff's claim dismissed and defendant's counterclaim allowed in part.

Reported by Ashok Kumar